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No. 93-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THERESA REALI, MURRAY LEWIS, JOHN STOOS, JAY BAGGETT, and DON BLYTHE,
Petitioners,

v.

FEMINIST WOMEN'S HEALTH CENTER,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of California

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

This case involves a suit by an abortion business (respondent Feminist Women's Health Center) to restrict pro-life picketing, leafletting, and sidewalk counseling outside the abortion facility. A state superior court in California, without finding that *any* of the particular petitioners had engaged in or threatened *any* of the alleged unlawful activities, nevertheless issued a permanent injunction against petitioners and imposed joint and several liability for over $100,000[1] in attorney fees. The

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[1] The trial court initially awarded $99,106.98 in attorney fees. Pet. App. 104a. The day after petitioners filed their petition for certiorari in this Court, the trial court awarded respondents an additional $30,601.50 for attorney fees incurred in resisting petitioners' appeals. *Feminist Women's Health Center v. Blythe*, No. 506341 (Cal. Super. Ct. Feb. 9, 1994). (The order is reproduced in

injunction included the creation of a "speech-free zone" on the public sidewalk in front of respondent's facility. The California Court of Appeal affirmed (with one judge dissenting in part), rejecting petitioners' federal constitutional objections to the lack of individualized findings, the "speech-free zone," and the award of attorney fees. The Supreme Court of Calfornia denied review, with one justice dissenting.

As petitioners demonstrated in their petition, the decision below blatantly conflicts with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and with numerous other decisions of this Court and of state and federal appellate courts. The petition also presents issues which overlap the issues currently pending before this Court in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880) (cert. granted Jan. 21, 1994). Accordingly, this Court should either grant review in the present case outright or else hold this case pending *Madsen*.

Respondent's Brief in Opposition does not answer the petitioners' arguments. Indeed, respondent appears not even to have read the petition.[2] Instead, respondent presents a combination of largely irrelevant or downright frivolous arguments.

First, respondent argues that because *respondent's* lawsuit rests on *state law causes of action*, this Court has no jurisdiction to review the explicit rejection, by the court of appeal, of *petitioners' federal constitutional defenses*.

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an appendix to this reply.) With interest, the judgment currently amounts to over $155,000. Respondent has also recorded liens against the property of three of the petitioners.

[2] Respondent spends considerable ink replying to arguments which petitioners did not make to this Court. *E.g.*, Br. in Opp. § II(A). Respondent appears to be replying to some other document. *See e.g., id.* at 17-18 (saying that "Petitioners also cite repeatedly" to two cases which do not even appear in the Petition for Writ of Certiorari).

Br. in Opp. § I. Merely to state this argument is to expose its utter frivolousness. *Infra* § I.

Second, respondent argues that the portion of the injunction excluding petitioners from a private parking lot is consistent with the state and federal constitutional guarantees of free speech. Br. in Opp. at 17-22, 24-25. But respondent wastes its ink on a non-issue: petitioners do not assert in this Court any constitutional right to free speech in private parking lots. *Infra* § II.

Respondent's actual discussion of legal issues contained in this petition consists of a scant eight pages. Br. in Opp. at 12-16, 22-24. Respondent's sparse and conclusory treatment of the case supplies no basis for denying review. *Infra* § III.

FACTS

Almost every citation to the record in respondent FWHC's Statement of the Case is either inaccurate, nonexistent, or grossly exaggerated. Petitioners have already refuted these errors point by point in the court below. *See* Reply Brief of Appellants Don Blythe, Murray Lewis, Theresa Reali, Jay Baggett and John Stoos at 3-9, *Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184 (1993) (No. 3CIV C01187).

For present purposes it suffices to reiterate that: (1) the trial court did not find that *any* of the particular petitioners had engaged in *any* unlawful conduct, Pet. App. 79a-81a (repeated, generic reference to "defendants and others"); (2) the court of appeal did not review the record independently, but instead viewed the record "in the light most favorable to the judgment," Pet. App. 3a, 14a; (3) the court of appeal did not find that *any* of the particular petitioners had engaged in *any* unlawful conduct, Pet. App. 4a-6a, 11a (repeated, generic references to "demonstrators," "antiabortion activities," etc.); (4) the court of appeal squarely held that no individualized

findings of unlawful conduct by any of the petitioners were necessary, Pet. App. 11a.

The court of appeal went so far as to embrace an *irrebuttable factual presumption* to make up for evidentiary voids: "A finding that defendants and others' engaged in the indicated conduct necessarily implies all defendants committed all the acts enumerated." Pet. App. 11a-12a. When petitioners, in a petition for rehearing, confronted the court of appeal with this travesty of due process, the court retracted this *explicit* statement, Pet. App. 106a (¶ 4), while continuing *de facto* to embrace the same rule of blanket, presumed, associational liability.

Furthermore, the "factual basis" which the court of appeal specifically identified and endorsed as supporting the injunction consisted of a potpourri of activities characteristic of virtually any public protest: "defendants and others" would "gather[] in front of [FWHC] to demonstrate . . ., waive [sic] signs . . ., chant, yell and use noise-making devices . . ., attempt to force literature on [FWHC's] clients, . . . persist in their attempts even after the client indicated her refusal, . . . reach for, bump into and surround plaintiff's clients, and . . . record the identities of [FHWC's] clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers." Pet. App. 11a (internal quotation marks and editing marks omitted). *Compare Edwards v. South Carolina*, 372 U.S. 229 (1963) (large, noisy demonstration); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04 (1982) (discouraging patrons and recording their identities); *id.* at 925 ("There is nothing unlawful in standing outside of a store and recording names"). *See also* Pet. App. 47a (Puglia, J., dissenting in part): "Debate in the forum of the streets lacks the orderliness and civility of the legislative forum . . . . Street debaters are not governed by Robert's Rules of Order."

Finally, it bears mention that the present litigation was by no means a battle over obstruction or similar wrong-

doing. Petitioners stated in the first five minutes of the trial that they would agree to an order (a) forbidding harassing and blocking FWHC patrons, (b) prohibiting following women who state that they do not wish to speak with petitioners, (c) prohibiting any grouping of persons which would obstruct entrance to FWHC, and (d) limiting the number of pro-life persons at FWHC at a given time. R.T. 126-29. Thus, the points of contention were two: (1) the "speech-free zone" on the public sidewalk, and (2) petitioners' free speech rights, if any, in the parking lot adjacent to FWHC.[3] In other words, the courts below imposed upon petitioners, and upheld, attorney fee liability in excess of $100,000, both without any individual findings of unlawful conduct, and predicated upon petitioners' defensive litigation of unsettled questions of free speech.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

Respondent Feminist's Women Health Center (FWHC) claims that "independent and adequate state grounds" support the judgment below. Br. in Opp. § I. This argument is completely frivolous.

This Court unquestionably has jurisdiction to review a state court's rejection, on the merits, of federal constitutional defenses. *E.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* 28 U.S.C. § 1257(a)

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[3] Petitioners' right, under the state constitution, to engage in peaceful public expression on the parking lot, was an open question at the time this case went to trial. In fact, the local district attorney had informed an FWHC representative that the parking lot in question was quasi-public and that police would not arrest people picketing there. R.T. 1019-20.

Petitioners do not urge in this Court any federal (or state) constitutional right to free speech in the parking lot. *Infra* § II. *See generally* Pet. at i-ii (Questions Presented).

(this Court has certiorari jurisdiction over any final judgment of a state court of last resort "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

FWHC argues that because FWHC brought suit under *state law* and because the California Court of Appeal sustained FWHC's *state-law* claims to injunctive relief and attorney fees, the decision below rests on state law grounds. Br. in Opp. § I. FWHC's "logic," however, totally disregards petitioners' *federal constitutional defenses.*

"Adequate and independent state grounds" may preclude review in this Court when a state court *upholds* a federal defense on the merits while supplying an independent state basis for the same result, or when a state court *rejects* a federal defense *on state procedural grounds. See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4019, at 661-62 (1977) ("if state substantive law is sufficient to support the judgment no matter how the federal question is resolved, or if the state courts have found adequate procedural reasons for refusing to decide the federal question"). In such cases state law would dictate the same result in the court below regardless of how this Court decides the federal issue; hence, a ruling by this Court would be purely advisory.

In the present case, by contrast, the federal issues are dispositive. The California Court of Appeal reached—and rejected on the merits—petitioners' federal constitutional defenses. Therefore, this Court has jurisdiction:

> When a state . . . court [of last resort] denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court. To suggest otherwise would contradict principles laid down in the Judiciary Act of 1789, 1 Stat. 73, 85

and settled since *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

Quinn v. Millsap, 491 U.S. 95, 104 (1989).[4]

II. RESPONDENT'S DEFENSE OF THE PARKING LOT EXCLUSION IS IRRELEVANT.

Respondent FWHC expends considerable effort defending that portion of the injunction which excludes petitioners from the parking lot adjacent to FWHC. Br. in Opp. § II(A); *id.* § II(B), at 24-25. This argument is entirely irrelevant: nowhere in their petition for certiorari do petitioners assert a First Amendment right to enter private parking lots.

III. RESPONDENT HAS FAILED TO REBUT THE GROUNDS FOR GRANTING REVIEW.

Finally, respondent devotes a few pages to a partial, conclusory treatment of the merits of the arguments actually contained in the petition for certiorari. Br. in Opp. at 12-16, 22-24. This discussion is unpersuasive for several reasons.

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[4] FWHC lamely asserts that petitioners did not timely raise the specific question of limiting attorney fees liability to reflect merits liability for unlawful conduct. Br. in Opp. at 13. There is no need, however, to squabble over the procedural details: the court below addressed and rejected the pertinent federal claims on the merits. Pet. App. 32a-34a. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). This remains true even if the court below could have refused to decide the federal questions:

> where the highest state court has discretion to disregard a federal question not raised in a lower court but nevertheless proceeds to decide the federal question because of its importance, or for any other reason, the federal question is considered to have been properly raised so as to sustain the Supreme Court's jurisdiction.

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 131 (7th ed. 1993) (and cases cited).

First, respondent makes no effort to resolve the conflicts between the decision below and the numerous contrary decisions of this Court and other state and federal appellate courts. Instead, respondent essentially does no more than beg the ultimate questions by blithely asserting that "[t]he Court of Appeal opinion is correct," Br. in Opp. at 2.

Second, respondent makes no serious effort to address the merits of petitioners' arguments. Indeed, respondent does not even bother to discuss this Court's precedents, choosing instead simply to rely upon several lower court cases. Br. in Opp. at 12-16, 22-24.

Third, respondent completely ignores this Court's grant of review in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880) (cert. granted Jan. 21, 1994), failing even once to cite the case much less acknowledge the overlapping issues between *Madsen* and the present petition.

In short, respondent treats the substantial federal constitutional issues in this case with the same insouciance that the court below offered petitioners' federal constitutional defenses. This Court should not tolerate such abuse of fundamental constitutional guarantees.

CONCLUSION

This Court should grant the petition for certiorari. In the alternative, this Court should hold the petition pending disposition of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 907 (1994) (No. 93-880) (cert. granted Jan. 21, 1994), and then either grant plenary review or summarily grant review, vacate the decision below, and remand for further consideration in light of *Madsen*.

Respectfully submitted,

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March 25, 1994

APPENDIX

ИЗЪЯТА

APPENDIX

SACRAMENTO
SUPERIOR AND MUNICIPAL COURTS

February 9, 1994

JUDGE JAMES L. LONG

Dept. No. 19

#506341

FEMINIST WOMEN'S HEALTH CENTER

vs

DON BLYTHE, *et al.*

NATURE OF PROCEEDINGS:

MOTION FOR ATTORNEY'S FEES—*ORDER*

Plaintiff's motion for attorney's fees pursuant to Code of Civil Procedure section 1021.5 is granted as follows:

Plaintiff shall recover total attorney's fees of $30,601.50. This award represents the $31,132.75 originally requested by plaintiff plus $787.50 incurred in the preparation of the reply brief less $918.75 from Mr. Hiestand's fees for time spent exclusively on the claims of defendants Walker and Operation Rescue (one hour on April 27, 0.5 hours on May 5, 2.25 hours on August 8, and 1.50 hours on August 23) less $400 from Mr. Merin's fees for time spent exclusively on the claims of defendants Walker and Operation Rescue.

The court finds that the claims pertaining exclusively to Walker and Operation Rescue were a very small portion of the time expended on the appeal as evidenced by the attorney's declarations, the statements of counsel at the hearing, and the appellate decision. The court finds $30,601.50 to be a reasonable amount of fees for what was required and accomplished at the appellate level.

The court has considered each of the arguments made by defendants and finds them to be without merit.

DATED: FEBRUARY 9, 1994

[SEAL]

/s/ James L. Long
Judge